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In The

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
PETITIONER,

- versus -

JOSE PADILLA, BY DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS and THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS as *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

The *National Association of Criminal Defense Lawyers* ["NACDL"] is a non-profit corporation with a subscribed membership of almost 11,000 national members, including military defense counsel, public defenders, private practitioners and law professors, and an additional 28,000 plus state, local and international affiliate members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.[1]

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases, both civilian and military. Among the NACDL's objectives are ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of criminal justice and preserving, protecting and defending the adversary system and the U.S. Constitution.

The *New York State Association of Criminal Defense Lawyers* [NYSACDL], founded in 1986, is a not-for-profit corporation with a subscribed membership of approximately 1,000 attorneys. It is a recognized State Affiliate of the NACDL. Its goals and objectives are similar to NACDL's.

Amici have been involved as *amici curiae* at every stage of the proceedings below in both the District Court and Second Circuit on the issues herein. Our interest in this case arises due to the fact that the basic right of a citizen to legal counsel and to communicate freely with that attorney has been absolutely debilitated in this case. Furthermore, the constitutional basis for depriving a citizen of his liberty by the Armed Forces without any due process of law, is a matter of grave

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[1]No counsel for a party authored this Brief in whole or in part. No person, entity or organization other than the *Amici Curiae* made a monetary contribution to the preparation and submission of this Brief or to counsel.

constitutional concern - especially when such confinement is done in a matter that has now held the citizen in a military prison for almost ***two years***.[2]

STATEMENT OF FACTS

Jose Padilla is a U.S. citizen. He is a civilian - not a member of the U.S. Armed Forces or the Armed Forces of any other country. On May 8, 2002, Mr. Padilla was arrested in Chicago, Illinois upon a material witness warrant issued by the District Court, Southern District of New York. On or about June 9, 2002, per an *ex parte* Military Order of the President as Commander-in-Chief, Mr. Padilla was removed from the custody of the Justice Department and transferred to the custody of the Department of Defense and confined at the U.S. Naval Base Brig, Charleston, South Carolina, where he remains.

SUMMARY OF ARGUMENT

From the founding of our Country, military control over the civilian populace has been an anathema to our Constitutional system. The composite structure of the Constitution, to include the Bill of Rights, supports the basic concept of "civilian supremacy." The military order of the Commander in Chief confining Mr. Padilla - a civilian - indefinitely in a military brig, violates this basic principle.

Not only has Mr. Padilla been imprisoned for almost two years as a *military* prisoner, he remains at all times *uncharged* with any crime, civilian or military. As a civilian, Mr. Padilla cannot *constitutionally* have military law applied to him. The only exception - legally and historically - would be the application of *martial law* to Mr. Padilla. Martial law however has not been declared, nor does any factual exigency or emergency exist such as to justify or necessitate it.

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[2]Counsel for the Parties have consented to *Amici* filing this Brief and such have been filed with the Court.

The Authorization for the Use of Military Force enacted by Congress on September 14, 2001, was a *limited* delegation of Congressional war power to the Commander in Chief. That delegation did not however, authorize the Commander in Chief to either designate a U.S. citizen, *not* a member of the armed forces of any country, as an "unlawful combatant," nor did it authorize the indefinite military detention of a U.S. citizen without charges.

Rather, the scope of the Joint Resolution which Petitioner relies on for justification, must be evaluated within the broad parameters of other Congressional enactments, specifically precluding the actions of the Petitioner herein and prohibiting the use of our military against our citizens domestically. The *Posse Comitatus* Act of 1878, 18 U.S.C. § 1385, was not repealed or excepted. Title 18, U.S.C. § 4001(a) [prohibiting "preventive detention" of citizens], was not modified, nor was 10 U.S.C. § 375 [prohibiting "direct participation" by military forces of "seizure, arrest or other similar activity" in law enforcement actions].

Both the Constitution and statutory authority - authority with specific lineage to Article I, § 8, U.S. Constitution - forbid the indefinite *military* detention of a civilian, U.S. citizen without charges for almost two years. There is no authority, express or implied, in Article II of the Constitution, that sustains Petitioner's arguments. *Habeas corpus* is and respectfully must be, the remedy.

ARGUMENT

I. THERE IS NO LEGAL AUTHORITY FOR THE COMMANDER-IN-CHIEF TO IMPRISON A CIVILIAN, CITIZEN IN A MILITARY PRISON, ABSENT MARTIAL LAW.

A. Overview.

Our Republic and the democracy that we enjoy, *i.e.*, a government "of the People, by the People, and *for* the People,"

did not come easily. As history shows, the United States was conceived in terroristic acts that evolved into a full-scale, military revolution. The "wars" with Native Americans, the Boston Massacre, Lexington and Concord and the ensuing siege of Boston all contributed to our Revolutionary War. Indeed, one of the chief complaints of the "Colonists," against the British Throne was, according to our *Declaration of Independence,* ". . . He has affected to render the Military independent of and superior to the Civil power. . . ."[3]

Amici Curiae emphasize this history because of its contextual relevance - the Framers of our Constitution were acutely aware of the dangers of surprise attacks as well as full-scale war. The military presence and oppression of King George III's armies were precipitating factors leading to war. Indeed, "terrorism" was a specific concern:

> "He has excited ***domestic insurrections*** amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, ***whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions***."[4]

It was with this background that our Constitution was born and from which it must be interpreted.

Those events were fresh in the minds of the citizenry when our Constitution was drafted, debated and ratified. The "civilian supremacy" influence permeates the document itself, *viz.*: Article I, § 8: Congress (civilians) regulates the military, declares war, etc.; Article II, § 2: The President (a civilian) is the Commander in Chief of the military; The Third Amendment: Citizens cannot be forced to "quarter" the military during peacetime, and only in a manner prescribed by law during war; The Fifth Amendment: The right to indictment by Grand Jury applies to all citizens "except in cases arising in

[3]http://www.archives.gov/national_archives_experience/declaration_transcript.html [last accessed, April 6, 2004].

[4]*Ibid.* [emphasis added].

the land or naval forces. . . ." *i.e.,* the military.

Thus, the core constitutional concept is one of civilian control over the military. Or, conversely: "The established principle of every free people is, that the law shall alone govern; and to it the military must always yield." *Dow v. Johnson,* 100 U.S. 158, at 169 (1879).

Amici Curiae submit that the *military* "order" here indefinitely confining Mr. Padilla by the military as a ***civilian,*** U.S. citizen in a military prison without charges, is simply unlawful. His *continued* military imprisonment is therefore, unconstitutional. *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991). While we recognize the constitutional tensions implicit in claiming illegality of the Commander in Chief's order under separation of powers concepts, it is indeed both the constitutional role and function of the judiciary under Article III, of the Constitution, to interpret the Constitution. *Marbury v. Madison,* 5 U.S. 137 (1803), both addresses and resolves this issue. It is the position of the*Amici* herein that the seizure and *continued* imprisonment of the Respondent violates the basic premise of civilian supremacy prohibiting military control over civilian citizens. This is especially so where Congress has repeatedly and *expressly* exercised its Article I, § 8 powers, *viz.,* in the *Uniform Code of Military Justice,* 10 U.S.C. § 801 *et seq.,* ["UCMJ"], the *Posse Comitatus Act,* 18 U.S.C. § 1385, and other statutes discussed hereinafter, laws that the President is Constitutionally bound to follow and "execute."

Amici Curiae would note that the Court *could* avoid the Constitutional conundrum of whether or not the Congressional *Authorization for the Use of Military Force,* P.L. 107-40, 115 Stat. 224 (2001), authorizes the President's military *detention* of Mr. Padilla in a constitutional manner, by focusing on the constitutionality of Padilla's *continued* military incarceration for almost two years absent any "charges" or other Due Process protections.[5] During the Civil War President Lincoln

[5]*Amici* do not concede this issue, but merely posit it to the Court in our (continued...)

unilaterally suspended the *privilege* of the Writ of *Habeas Corpus* and ordered a military blockade of Southern ports because Congress was not in session. Lincoln thereafter sought Congressional "ratification" for his actions, something that has *not* done here.[6] Thus, whether or not Congress has authorized (or constitutionally *could* authorize without suspending the Writ of *Habeas Corpus*) a military detention of a U.S. citizen need not be reached by this Court *if* Mr. Padilla's *continued* military detention is unconstitutional as violative of Due Process. *See generally, Duncan v. Kahanamoku*, 327 U.S. 304 (1946) [no factual necessity for continued martial law] and *Zadvydas v. Davis*, 533 U.S. 678 (2001) [no clear Congressional intention for indefinite detention of alien].

B. "Military" Law Does Not Apply to Mr. Padilla.

Necessary definitions relevant herein are as follows:

Military Law. "[T]he exercise of that branch of the municipal law which regulates its military establishment."[7] Here, it is the *Uniform Code of Military Justice* ["UCMJ"],[8] and its implementing regulations.

Martial Law. "A government temporarily governing the civil population within its territory or a portion of its territory through its military forces as necessity may require."[9]

A fortiori Mr. Padilla, a United States citizen who is not a member of the United States military, cannot Constitutionally

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[5](...continued)
capacity as *amici curiae* as a conceptual alternative to the Parties' positions.

[6]*See* 12 Stat. 326 (1861)[blockade], and 12 Stat. 755 (1863) [*Habeas Corpus* suspension].

[7]Paragraph 2, page I-1, *Manual for Courts-Martial (2002 Edition)* [Washington, DC: GPO][hereinafter "MCM"]. The MCM is an Executive Order.

[8]10 U.S.C. § 801 *et seq.*

[9]MCM, paragraph 2, page I-1.

have *military law* applied to him under the present circumstances. Furthermore, since "martial law" has not been declared (nor could it be at this juncture)[10], no ***military*** authority constitutionally exists to confine the Respondent.

The actions of the Commander in Chief must be viewed through the constitutional limitations placed on that office, versus that of the President in general. [11] The "power" of the President is simply not at issue in this case because the basis of the illegal confinement is a *military* order of the Commander in Chief.[12] The Petitioner's position herein, *viz.*, that the Commander in Chief has unfettered detention authority by virtue of issuing a *military* order, is simply wrong. It is also unconstitutional as *Little v. Barreme*, 6 U.S. 170 (1804), makes clear. *Little's* basic premise is respectfully controlling herein. There Congress delegated certain limited "war powers" to the Executive [compare the *Authorization for Use of Military Force*]. However, in implementing that delegation the President issued a *military* order exceeding the scope of the delegation [*compare* the military order indefinitely confining Padilla]. This Court held in *Little* that the order was *ultra vires* and respectfully, should do so herein.

Finally, when it comes to interpreting the Constitution, as *Marbury v. Madison, supra*, and its progeny teach, it is the duty of the Judiciary - not the Commander in Chief - to do so. And, as *United States v. Nixon*, 418 U.S. 683 (1974), illustrates, no man - to include the President - is above the law. *See also, Sterling v. Constantin*, 287 U.S. 378 (1932).

C. There is No Historical Precedent for the Commander in Chief's Action Herein.

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[10]*See, Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

[11]*Cf. The War Powers Resolution*, 50 U.S.C. § 1541 *et seq.*

[12]Indeed, by *fiat* the Commander in Chief has created a classic *Bill of Attainder* against the Respondent herein. *See* Article I, § 9, cl. 3, U.S. Const. *Compare, United States v. Brown*, 381 U.S. 437 (1965).

Absent a formal, Congressional declaration of war,[13] or the lawful imposition of martial law, the Commander in Chief's military authority is limited by the Constitution's terms. The *Federalist Papers* demonstrate that the drafters of our Constitution, firmly rejected the concepts claimed by the Commander in Chief herein.[14]

Hence, a suspicion of Executive encroachment - both as to power and as to liberty - was clearly of prime concern to the Drafters. Indeed, while providing for a system of government with a "separation of powers," it also wisely provided for a Constitutional system of "checks and balances." It is thus clear constitutionally, that the Commander in Chief cannot *now sua sponte* assume military powers neither enumerated within the text of the Constitution, nor expressly delegated by the Congressional "War Power."

Alexander Hamilton, the author of *Federalist, Number 69,* entitled, *The Real Character of the Executive,* stated:

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, ***but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy;*** while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, ***all which, by the Constitution under consideration, would appertain to the legislature.*** [Emphasis added].[15]

It is therefore abundantly clear that the Framer's view of the Commander in Chief's power was limited and again, the War Power clearly resided and remained with the Congress - absent a true and sudden "emergency,"[16]

D. The Historical, Subservient Role of the Military.

In 1792, Congress passed the *Militia Act*[17], authorizing the President to federalize the State Militias in the event of certain domestic contingencies. In 1794, the so-called *"Whiskey Rebellion"* in Western Pennsylvania, required action. Pursuant to the *statutory* authority (which required a form of "probable cause" by a jurist), President Washington ordered the mobilization of the Militia to suppress the insurrection. Yet, in his "Military Order" he made no effort to interfere with the Judiciary, indeed he commanded the troops:

> You are to exert yourself by all possible means to preserve discipline amongst the troops, particularly a scrupulous regard to the rights of persons and property, and a respect for the civil

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[13]The Joint Congressional "Authorization for Use of Military Force," *supra,* is *not* a Declaration of War, nor does it suspend *habeas corpus*, nor authorize the indefinite military detention of a civilian citizen. It offers no authority for the Petitioner herein.

[14]In *Federalist, No. 48,* Madison observed:

> In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, ***the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire.*** [Emphasis added].

http://memory.loc.gov/const/fed/fed_48.html [last accessed, April 5, 2004].

[15]http://memory.loc.gov/const/fed/fed_69.html .

[16]The facts here belie any claim of "emergency" such as experienced by Lincoln. Here, Padilla was arrested in Chicago, taken to New York City, arraigned, had counsel assigned and was engaged in litigating his "material witness" status, when roughly one *month* later, the decision to *militarily* imprison him indefinitely was made.

[17]1 Stat. 271; *see also* 1 Stat. 424 (February 28, 1795).

magistrates . . . .[18]

Washington clearly understood that his power as Commander in Chief was limited and depended upon Congressional authority. While the military made numerous arrests, detentions and prosecutions were handled by the civilian court system.

As early as 1807, this Court addressed the issue in *Ex Parte Bollman,* 8 U.S. 75 (1807). Bollman and others were arrested by the Army and charged with treason. The military, on orders from President Thomas Jefferson, turned the prisoners over to the jurisdiction of the federal court in the District of Columbia, who then detained them. The prisoners sought *habeas corpus* relief. This Court granted the *writs* and noted that only Congress could order the suspension of the writ of *habeas corpus.* Absent that, it was up to the Court to decide the merits of the petition for *habeas* relief - the very issue herein.

One of the earliest American commentators on "military law," in 1846, rejected the Petitioner's arguments advanced herein and he was a military officer!

> ***The substitution of this power [martial law] for the civil courts, subjects all persons to the arbitrary will of an individual, and to imprisonment for an indefinite period . . . .***
>
> Now, to guard against such abuse, the constitution guarantees the privilege of the writ of *habeas corpus . . .* ***and the intervention of congress is necessary before such suspension can be made lawful.***. . . . Mr. Justice Blackstone says, "but the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient, for it is the parliament only . . . that . . . can authorize the crown, by suspending the *habeas corpus* act . . . to imprison suspected persons without giving any reason for so doing" [Emphasis added][19]

In May of 1861, Merryman (a civilian) was arrested by the U.S. Army. He was placed in military confinement at Fort McHenry. No charges - civilian or military - were lodged against him, and a "copy of the warrant or order under which the prisoner was arrested was demanded by his counsel, and refused . . . ." *Ex Parte Merryman,* 17 Fed. Cas. 144, at 147 (C.C. D. Maryland, 1861). His attorney then sought a writ of *habeas corpus* and Chief Justice Taney, as Circuit Judge heard the case. The Commander of the Fort, refused to comply with the writ, citing President Lincoln's *unilateral* decision to suspend the writ. In his decision ordering Merryman's release (which Lincoln ignored), Chief Justice Taney noted that the specific language of Article I, § 9, of the Constitution, gives Congress alone the power to suspend the writ.

Chief Justice Taney's *Merryman* opinion in the abstract, probably comported to the Framer's intent. However, in practice, he failed to address *two* salient facts: Congress was *not* in session at the time (unlike Mr. Padilla's on-going situation); and Merryman was physically in a zone of active and on-going military hostilities.[20]

Two years after *Merryman, supra,* this Court decided the *Prize Cases,* 67 U.S. 635 (1863), involving a naval blockade of Confederate ports and the seizure of foreign vessels. What is generally overlooked is that first, at the time of President Lincoln's order, Congress was not in session, and

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[18]As quoted in Frederick B. Wiener, *A Practical Manual of Martial Law,* (Harrisburg, PA: The Military Service Pub. Co., 1940), at 103. Indeed, Washington also sent the federal district judge and the United States Attorney along, *id.,* at 55.

[19]William C. DeHart, Captain, U.S. Army (Acting Judge Advocate of the Army), *Observations on Military Law* (NY: Wiley & Halsted, 1859 ed, copyrighted 1846) [reprinted in 18 *Classics in Legal History,* Wm. S. Hein & Co, Buffalo, NY, 1973], at 17-18.

[20]Chicago may be many things, but at the time of Padilla's arrest on May 8, 2002, it was *not* a military battle zone. Nor was New York City a "combat zone" the day Padilla was placed into *military* custody, June 9, 2002.

second, Lincoln sought and received Congressional ratification for his initial, emergency blockade order. 67 U.S. at 670-71; 12 Stat. 326 (1861). Thus, the "war power" of the Commander in Chief ultimately flowed from Article I, and the Congress. Lincoln acted "extra-constitutionally" in a time of imminent crisis *and* on-going military engagements.[21]

Ex Parte Milligan, 71 U.S. 2 (1866), resolves the matter *sub judice*. Without express *Congressional* action, a United States citizen cannot be detained or imprisoned by the U.S. military, absent a *bona fide* existence of martial law. Milligan, a civilian was granted *habeas corpus*, after arguing that the military (in a non-battle zone) had no jurisdiction to detain or try him.

> ***Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power"*** -- the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence.[22] [emphasis added]

Milligan was not an aberration of military jurisprudence, as is implicit from the writings of that century's greatest military law scholar, Colonel William Winthrop, U.S. Army. In his seminal work, *Military Law and Precedents*, 2nd ed. (Washington, DC: Gov't Printing Office, 1920) [Legal Classics Library reprint], at 891; he notes the following:

> Where . . . an officer of the army is served with a writ of *habeas corpus* issuing from a court of the *United States*, he will make full return of the same . . . and on the return day will appear with the body of the petitioner before the court ***to abide by its order thereupon.*** [emphasis added in bold].

That concept was followed by the military through World War II. In a treatise by Colonel Lee S. Tillotson, JAG Dep't, U.S. Army (ret.), *The Articles of War Annotated*, (Harrisburg, PA: The Military Service Pub. Co., 1942), the author states in a section headed, "HABEAS CORPUS:"

> "34. **In a case of disputed jurisdiction over a person subject to military law, as between the civil and military courts, the question should be raised by writ of *habeas corpus* in a Federal Court.** The military authorities must recognize such writ and surrender the body of the person wanted in response thereto, ***leaving the whole question to be decided by the court from which the writ issued."*** *Id.*, at 163 [Emphasis added].

Rather than any "due deference" argument to the Commander in Chief, it is quite clear that the military itself was under the correct constitutional construct that they, the military, must give "due deference" to the jurisdiction of the federal courts, and indeed, that such courts were the proper forum to decide "disputed jurisdiction."

The Court next visited this area of military jurisprudence in *Ex Parte Quirin*, 317 U.S. 1 (1942). Indeed, that is the judicial d.am that the Petitioner is beating loudest, for that is his stated basis for categorizing the Respondent as an "unlawful combatant." However, even that claim is not historically accurate from a military perspective.

Colonel Winthrop recognized what he termed, "uncivilized combatants," those who do not respect the laws of war. Thus,

> Not being within the protection of the laws of war, they were treated as criminals and outlaws, not entitled upon capture to be held as prisoners of war, liable to be shot, imprisoned or

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[21] For an exceptional analysis of the "ratification" process in the *Prize Cases*, *see*, J. Randall, *Constitutional Problems Under Lincoln*, rev. ed. (Urbana, IL: Univ. Illinois Press, 1951), pp. 52-58. *See also* D. Farber, *Lincoln's Constitution* (Chicago: Univ. Chicago Press, 2003), pp. 127-138.

[22] 71 U.S. at 124-25.

> banished, either summarily where their guilt was clear or upon trial and conviction by military commission. Winthrop, *op cit.*, at 784.

Winthrop's observations however must be kept in the context of what he was describing - combatants who either were captured or surrendered on the battlefield, *i.e.*, "caught in the act" guilty, ***could be*** dealt with *summarily* - otherwise they were tried.[23]

Quirin is a judicial anomaly and of limited value once one actually understands the case.[24] It was undisputed that (a) the United States was in a "declared" war with Germany; (b) that all eight defendants were members of the *uniformed* German military; (c) they were on an actual military mission (having been brought to the U.S. via German U-Boats); and (unlike Padilla) (d) all were facing criminal charges under military law.

Attorney General Biddle's claim that the Commander in Chief had "absolute" power over the "enemy," was ***not*** adopted by the Court. Petitioner now cites *Quirin* for the proposition that even U.S. citizens could be held as "unlawful enemy combatants," but a closer reading does not support that broad proposition and to the extent that the Court's opinion comments on it, it is clearly *dicta*. The issue of citizenship was in reality a non-issue, simply because it was clear that all of the saboteurs were members of the German Reich's military forces, *not* civilians.[25] None of this has any relevance to the case

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[23]George Washington set the precedent for trying spies, rather than summarily executing them. When British Major Andre (the collaborator with Benedict Arnold) was captured behind American lines, in civilian clothes, Washington ordered a military trial. This is discussed in *Ex Parte Quirin*, 317 U.S. 1, at 31, fn. 9 (1942).

[24]For the most comprehensive and recent legal analysis of the case see, Louis Fisher, *Nazi Saboteurs On Trial* (Lawrence, KS: Univ. Press of Kansas, 2003).

[25]Indeed, what knocks *Quirin's* prop out from under Petitioner's claims is that the ***civilian*** co-defendants to the ***Quirin military*** case, were all indicted (continued...)

herein and therefore, *Quirin* stands for nothing when there is no declared war, when there is no issue as to "citizenship," indeed, when there are no charges period pending against the Respondent. The *Quirin* military defendants were charged and tried - not placed into some indefinite military legal limbo.

Quirin, as modern precedent also suffers from some additional problems - first, Congress in passing the *Uniform Code of Military Justice* [UCMJ],[26] in 1950, engaged in a comprehensive overhaul of military law, something Article I, § 8, clearly gives them the power to do. Second, the 1949 Geneva Conventions were obviously adopted post-*Quirin*, so that court never considered them or their impact on domestic law here in the United States. Third, more recently ratified U.S. treaties, *e.g.*, the *International Covenant on Civil and Political Rights*,[27] ["ICCPR"] of which the United States is a signatory, supercedes any efficacy *Quirin* ever had regarding arbitrary and indefinite military detentions.[28]

One of the anomalies of this Court were the Japanese Evacuation and Internment Cases from the West Coast, after the Pearl Harbor attack. On February 14, 1942, the President issued Executive Order # 9066, essentially forcing West Coast Japanese Americans into concentration camps unless they

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[25](...continued)
and tried in *federal* court. *See, Cramer v. United States*, 325 U.S. 1 (1945); and *Haupt v. United States*, 330 U.S. 631 (1947). *See,* L. Fisher, *op cit.*, at 80-84.

[26]10 U.S.C. § 801, *et seq.*

[27]G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* March 23, 1976; available on-line at: http://www1.umn.edu/humanrts/instree/b3ccpr.htm.

[28]The ICCPR provides:

> ***Article 9, Section 4:*** Anyone who is deprived of his liberty by arrest or ***detention*** shall be entitled to ***take proceedings before a court***, in order that court may decide without delay on ***the lawfulness of his detention*** and order his release if the detention is not lawful." [emphasis added].

voluntarily "relocated." However, before the Constitutionality of this Order could be challenged, Congress ratified it. *See,* 56 Stat. 173 (1942). A number of cases ultimately reached this Court, which generally upheld these actions as proper "war measures." *See Hirabayashi v. United States,* 320 U.S. 81 (1943); and *Korematsu v. United States,* 323 U.S. 214 (1944). *See also Ex Parte Endo,* 323 U.S. 283, at 300 (1944).[29]

The convictions however, were procured by fraud and their ***only*** relevance today is that courts should be highly skeptical of any claims from the Commander in Chief arguing "military necessity." In *Korematsu v. United States,* 584 F.Supp 1406 (N.D. Cal. 1984), the Court granted a writ of *error coram nobis* and reversed Korematsu's conviction. The basis was the Government's *misrepresentation* during the case of the existence of "intelligence" purporting to establish a military necessity for the evacuation orders in the first place.[30] *See also, Hirabayashi v. United States,* 627 F.Supp 1445 (W.D. Wash. 1986) [reversing in part some of his convictions].[31]

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[29]Ms. Endo was freed in part because the Congressional ratification of the Executive Order in question did not "use the language of *detention.*" Neither did the Joint Resolution herein. Furthermore, there has been no Congressional ratification herein of the "military order" detaining Padilla, unlike *Endo* and the *Prize Cases. Amici* would note, consistent with *INS v. St. Cyr,* 533 U.S. 289 (2001), that if Congress had *any* desire to restrict *habeas* jurisdiction, as Petitioner argues is implicit from the Use of Military Force Resolution, *supra,* it would have done so when it enacted the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[30]For a comprehensive review of this sordid process, *see* Peter Irons, *Justice at War* (NY: Oxford Univ. Press, 1983), where the author documents and traces the government's misconduct; *e.g.,* "[P]resenting to the Supreme Court a key military report that contained 'lies' and 'intentional falsehoods.'" *Id.* at ix. During "Watergate," according to U.S. District Court Judge Sirica, *false* claims of "national security" were proffered to the Court as a basis to avoid complying with Grand Jury subpoenas. J. Sirica, *To Set the Record Straight,* (NY: W.W. Norton & Co., 1979), at 155.

[31]The misrepresentations of various Commanders in Chief exercising their purported "war power," has been extensively documented. *See, e.g.,* H.R.

(continued...)

Duncan, supra, is like *Milligan*, respectfully submitted as controlling. A civilian convicted in Hawaii long after the need for martial law expired (the Courts were open and functioning), it was thus under the precedent of *Milligan*, unconstitutional to try a U.S. civilian by a military tribunal. Therefore, *habeas corpus* was granted as the military had no authority to hold the "prisoner." Similarly, there is no lawful authority for the military to continue its detention of Mr. Padilla under the totality of circumstances herein.

Finally, the core reason that the Petitioner's arguments must fail stems from *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952). This is the seminal case discussing the Constitutional *limitations* on the President's perceived "War Power." The Court itself held that even in times of a national emergency, the President lacked any independent legal basis to seize corporations for the "war effort" in the face of express Congressional prohibitions.[31] Clearly, if the President cannot seize a corporation even as Commander in Chief, he cannot invest himself with the authority to seize and detain a U.S. citizen, contrary to the Fourth and Fifth Amendments.[32]

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[31](...continued)
McMaster, Major, U.S. Army, *Dereliction of Duty: Lyndon Johnson, Robert McNamara, The Joint Chiefs of Staff, and the Lies that Led to Vietnam* (NY: HarperCollins, 1997); Sirica, *op cit.*

[31]Similar specific prohibitions exist herein. *See* Point II, *infra.*

[32]This interpretation is consistent with *Henkels v. Sutherland,* 271 U.S. 298, at 301 (1926), where the Court held, "With enemy-owned property . . . the United States may deal as it sees fit [citation omitted]; ***but it has no such latitude in respect of the property of an American citizen.***" [Emphasis added]. Again, if the enumerated "war power" of Congress cannot be used to seize ***property*** of a civilian citizen, surely it cannot be used to *seize* the Person of the Respondent herein. *See also, Mitchell v. Harmony,* 54 U.S. 115, 134 (1852) [U.S. Army officer illegally seized property of U.S. citizen during war with Mexico, "the emergency must be shown to exist before the taking can be justified."], and *United States v. Russell,* 80 U.S. 623, 628 (1972) [steamship commandeered by Union forces in 1864, same].

Justice Jackson's concurring opinion[33] bears repeating as he traces the history of the Chief Executive's power - in war and peace:

> There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants. ***He has no monopoly of "war powers," whatever they are.*** While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command.
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> * * *
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> His command power is . . . subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress. ***The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office. . . . What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.*** 343 U.S. 643-46.

Justice Jackson next addressed the claimed "emergency" doctrine:[34]

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[33]*Cf., Dames & Moore v. Regan,* 453 U.S. 654 (1981).

[34]Unlike Lincoln's *bona fide* emergency - there was a war going on literally in his back yard - *Youngstown's* "emergency" was the President's perceived need to control steel production during the Korean War. Lincoln sought Congressional ratification from Congress, Truman chose to ignore (continued...)

> The appeal, however, that we ***declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted.*** They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of *habeas corpus* in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. . . . ***Their experience with emergency powers may not be irrelevant to the argument here that we should say that the Executive, of his own volition, can invest himself with undefined emergency powers.*** 343 U.S. at 650-51 [Emphasis added].

In a *habeas corpus* case involving a *former* member of the military, but a civilian at the time of his arrest, the Court in *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955), held that the military could *not* exercise any jurisdiction over civilians, even for crimes committed by that person while serving on active duty. In striking down a provision of the *Uniform Code of Military Justice*, the Court also noted that, "this assertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law." 350 U.S. at 14 [citing *Milligan*]. Plainly, if neither Congress nor the Commander in Chief can lawfully obtain jurisdiction over a civilian, former military member for specific criminal acts, that cannot under any interpretation or

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[34](...continued)
legislative history *rejecting* seizure under the circumstances that existed.

extrapolation of the law confer any "jurisdiction" to the Commander in Chief over Respondent herein.

Thus, Petitioner is faced with the case of *Reid v. Covert,* 354 U.S. 1 (1957), and its progeny. *Reid* dealt with the court-martial of a civilian spouse who had killed her military husband while stationed overseas, as authorized by a statutory provision in the UCMJ. After her conviction and direct appeals, she sought *habeas* relief on the grounds that the military had no *criminal* jurisdiction over her as a *civilian.* This Court agreed and its analysis began with a reassertion of the civilian-supremacy doctrine:

> The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution. . . . The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. 354 U.S. at 23-24.

The Court went on to look at its own precedents:

> The *Milligan, Duncan* and *Toth* cases recognized and manifested the deeply rooted and ancient opposition in this country to the extension of military control over civilians. ***In each instance an effort to expand the jurisdiction of military courts to civilians was repulsed.*** 354 U.S. at 33.

Amici respectfully suggest that the situation herein is more egregious. Petitioner has detained and militarily imprisoned, *i.e.,* deprived Mr. Padilla of his liberty, without *any* charges simply by labeling him an "enemy combatant," and confining him virtually *incommunicado* in a military Brig.

Indeed, even the United States armed forces do not use the utterance "enemy combatant" to mean anything ***other than***

being synonymous to enemy soldier. [35] Nor did Congress in enacting the *Uniform Code of Military Justice,* 10 U.S.C. § 801 *et seq.,* use the phrase "enemy combatant." [36] Perhaps most damning to the Petitioner's assertion in this regard is that his own *Department of Defense Dictionary of Military and Associated Terms,*[37] *viz.,* Joint Publication 1-02, nowhere lists or defines the term "enemy combatant."

The wisdom of the *Reid* Court should be heeded: "We should not break faith with this Nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly rooted in the Constitution." 354 U.S. at 40.

II. CONGRESS HAS CONSISTENTLY AND REPEATEDLY EXPRESSED ITS WILL THAT *CIVILIAN*-CITIZENS WILL NOT BE SUBJECT TO MILITARY AUTHORITY OR JURISDICTION.

Absent an express textual grant to the Executive, the will of Congress as Justice Jackson's concurring opinion in

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[35] *See, MCM,* Rule 916(c), *Rules for Courts-Martial,* "Discussion," which notes as to the defense of "justification," "killing an ***enemy combatant*** in battle is justified." [Emphasis added]. Nor is the term used in the 1949 Geneva Conventions or in other contemporary international law documents.

[36] In military jurisprudence, for the military to exercise "jurisdiction" over an individual, one must first possess military "status." *See, Solorio v. United States,* 483 U.S. 435 (1987). But, as *Solorio* held, that is a function textually committed to *Congress,* not the Commander-in-Chief pursuant to Article I, § 8, 483 U.S. at 440-41. But, even Congress cannot "militarize" the status of civilians for purposes of exercising military jurisdiction over them. *Cf., Reid v. Covert,* 354 U.S. 1 (1957), and *Kinsella v. Singleton,* 361 U.S. 234 (1960). Thus, the President can hardly claim such power.

[37] Available on-line at: http://www.dtic.mil/doctrine/jel/doddict/ [last accessed, April 6, 2004]. Quite simply, Petitioner has extracted an innocuous phrase from the *Quirin* opinion and now seeks to *ipse dixit* create a heretofore unknown "status" in domestic military law and the law of war.

Youngstown, supra, points out, is the primary barometer for assessing any Presidential "war powers." Thus, when the President is acting in a matter "incompatible with the express or implied will of Congress," [Jackson's category "3" scenario, 343 U.S. at 637-38], the President's power is "at its lowest ebb." The Judiciary can sustain such Executive power "only by disabling the Congress from acting upon the subject." *Id.* But, as here where Congress has affirmatively, clearly and expressly exercised its Article I, § 8, powers, Executive assertions to the contrary must be constitutionally rejected.

The seminal legislation is the *Posse Comitatus* Act, 18 U.S.C. § 1385 (1878).[38] This was an explicit prohibition against the use of the military against civilians, prompted by military abuses during Reconstruction. The Act, with two specified exceptions, *criminally* prohibits the use of the military to "execute the laws" of the United States. [39] Furthermore, to insure maximum compliance by our military, ***Petitioner's*** own regulations state in part that the *Posse Comitatus* Act "Prohibits search, seizure or arrest powers to US military personnel."[40]

There are two exceptions within the Act: those "authorized by the Constitution" [an express textual grant, *e.g.*, Art. I, § 8, cl. 15, U.S. Const., "calling forth the Militia to execute the laws...."], and those authorized by "Act of Congress." 18 U.S.C. § 1385. Congress has been far from silent legislatively in this regard: on one hand, *prohibiting* conduct that might run afoul of the Act, and conversely, passing

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[38]Other examples go back to the early days of the Republic. *Cf.*, the *Militia Acts* of 1792 and 1795, *supra,* and the scenario in *Little v. Barrame, supra.*

[39]While on its face the *Posse Comitatus* Act only applies to the Army and Air Force [Padilla being in a Navy Brig], the ***Petitioner*** by his own regulation applies this Act uniformly throughout the Armed Forces. *See,* DoD Directive 5525.5, *DoD Cooperation With Civilian Law Enforcement Officials* (January 15, 1986, as amended).

[40]*DoD Dictionary of Military and Associated Terms,* Joint Publication 1-02. *See* fn. 38, *supra.*

specific exceptions to the *Posse Comitatus* Act.[41]

A. "Prohibiting" Legislation.

Title 18, U.S.C. § 4001(a), states: "No citizen shall be imprisoned or ***otherwise detained*** by the United States except pursuant to an Act of Congress." [emphasis added]. Notably, the language does not read, "an Act of Congress ***or by Order of the President.***" Yet, that is the construct the Petitioner would have the Court adopt. *Amici* submit that § 4001(a) must be construed *in pari materia* with the *Pose Comitatus* Act, *supra.*[42] This is Petitioner's primary conceptual failure - Padilla, a U.S. citizen - cannot be "imprisoned or otherwise detained. . . ." by our military forces.

To clarify the *Posse Comitatus* Act, 10 U.S.C. § 375 was enacted. This mandates *inter alia* that Petitioner insure that any military "activity" (a broad parameter) "does not include or permit direct participation by a [military] member . . . in a search, seizure, arrest or other similar activity unless . . . otherwise authorized by law." There was and is *no* Congressional authorization for the U.S. military to *seize* and imprison Mr. Padilla in a military Brig, and thus Petitioner is in

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[41]As will be shown, Congress is both keenly aware of the Act and demonstrates regularly its willingness to legislate various exceptions. Their *failure* to do so post "9/11" is indicative of their *unwillingness* to grant the Commander in Chief the powers he claims herein. *See also,* House of Representatives, Committee on the Judiciary, Subcommittee on Crime, *Hearing on H.R. 3519* (amending *Posse Comitatus*)(June 13, 1981). William H. Taft IV, then DoD General Counsel (currently Legal Advisor to the Secretary of State) testified:

> "We oppose section 375, which would involve the armed forces directly in civilian law enforcement operations ***such as arrests and seizures.*** . . . The Department [of Defense] is committed to the fundamental separation between military and civilian activities. . . ." *Id.,* 15-16.

[42]Contrary to the contentions of Petitioner, it is not surprising that the DoD took no position on the enactment of § 4001(a). Petitioner's Brief at 47, fn. 20. The *Posse Comitatus* Act already barred them from such activity.

on-going violation of § 375.

B. Statutory Exemptions - the *Posse Comitatus* Act.

Petitioner cannot claim Congressional inactivity or abdication relative to the statutory exemptions envisioned by the Act. *Amici Curiae* will briefly address the major statutory exemptions to the *Posse Comitatus* Act in the context that Congress consistently uses quite specific language when it wants to exempt certain areas from the proscriptions of the Act, unlike the generalities of the *Authorization for Use of Military Force, supra.*

Title 10, U.S.C. § 332, part of the *Insurrection Act*, specifically ***allows*** the use of the military when events or "rebellion" "make it impracticable to enforce the laws. . . *by the ordinary course of judicial proceedings.* " [emphasis added]. This then codifies the *Milligan* "open court" component in the context of *martial law.*

Title 10, U.S.C. § 382, is a comprehensive and complex statutory exemption dealing with chemical or biological weapons in an "emergency situation,"which is specifically defined in the statute. This certainly demonstrates that Congress can and does limit military involvement with civilians to very precise parameters.

Title 18, U.S.C. §§ 351(g), 1116(d), and 1751(I), provide for the use of military forces when specified criminal acts (murder, assassination, etc.) are employed against high ranking officials. Again, both the crimes and the victims are narrowly drawn.

Title 18, U.S.C. § 831, is specific statute, allowing military law enforcement activity when there are "prohibited transactions involving nuclear materials." Section 831(e)(3)(A) specifically allows the military to "arrest . . . and conduct searches and seizures. . . ." under *limited* circumstances.

Title 32, U.S.C. § 112, expressly allows the use of the National Guard for "drug interdiction and counter-drug activities." Again, this is a specific exception to the Act.

C. Other Relevant Statutory Provisions.

When Congress in 1950, repealed the Articles of War and enacted the *Uniform Code of Military Justice,* it significantly limited the scope of who was to be subject to military law in Article 2(a), UCMJ.[43] But even that narrowly defined group proved to be constitutionally "over broad" in the context of including *civilians* who this Court subsequently found could *not be* subjected to military jurisdiction. *See, e.g., Toth v. Quarles, supra; Reid v. Covert, supra; Kinsella v. Singleton, supra,* and their progeny.[44]

Article 2(a)(9), UCMJ, 10 U.S.C. § 802(a)(9), provides the only *possible* basis for the military to acquire "jurisdiction"

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[43]10 U.S.C. § 802(a).

[44]The issues of the Commander in Chief's "war powers" in general and asserting *military* authority over civilians in particular, has vexed the Executive Branch for 200 years. *See, Little v. Barrame, supra* (1804) [illegal seizure of ship]; *Smith v. Shaw,* 12 Johns (22 NY Common L. Rptr) 257, 265 (NY, 1815) [false arrest by military during War of 1812: "If the defendant was justified in doing what he did, every citizen of the United States would, in time of war, be equally exposed to a like exercise of military power and authority."]; *Mitchell v. Harmony, supra* (1852) [illegal seizure of property by Army during Mexican War]; *In re McDonald,* 16 Fed.Cas. (# 8,751)(ED, Mo., 1861) [*habeas* action by civilian held in military Brig]; *Ex Parte Benedict,* 3 Fed.Cas. (# 1,292)(ND, NY, 1862) [*habeas* - civilian confined under "orders of the war department."]; *Ex Parte Field,* 9 Fed.Cas. 1 (#4,761)(D.Vt., 1862) [*habeas* - civilian confined "under some general order from the war department."];*Jones v. Seward,* 40 Barb. 563 (NY Sup. Ct., 1863) [false imprisonment by military: "the question to be determined being, whether the president of the United States . . . can arrest or imprison . . . any person not subject to military law . . ."]; *United States v. Russell, supra* (1872) [property confiscation by military during Civil War]; *Ex Parte Weitz,* 256 Fed. 58 (D. Mass. 1919) [*habeas* - civilian jailed by Army]; *United States v. Yasui,* 48 F.Supp. 40 (D. Ore. 1942), *aff'd* 320 U.S. 115 (1943) [Japanese internment case]; *Seery v. United States,* 127 F.Supp. 601 (Ct. Cl. 1955) [suit for damages and theft by U.S. Army in Austria]; and *Solorio v. United States, supra* (1987) [military jurisdiction textually committed to Congress].

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over the Respondent, *i.e.*, he is a "Prisoner of War."[45] Mr. Padilla is for sure a prisoner, but under both domestic and international law, he is *not* a Prisoner of War.[46]

As noted above, Congress has been careful to limit and define military law enforcement powers. Thus, Congress enacted Article 9, UCMJ,[47] which states in relevant parts:

> (a) ***Arrest*** is the restraint of a person by an order . . . ***Confinement*** is the physical restraint of a person.
>
> * * * * *
>
> (d) ***No person*** may be ordered into arrest or confinement except for probable cause. [emphasis added].[48]

Notably, Mr. Padilla in almost two *years* of confinement has never had any type of "probable cause" hearing. *Cf., County of Riverside, supra.* That is *no* process, much less *Due Process.*

Congress continued its limitations in Article 10, UCMJ, 10 U.S.C. § 810, by stating:

> **Restraint of persons charged with offenses:**
> . . . When any person ***subject to this chapter*** is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him. [emphasis added].

It is clear just from the section's title that "preventive detention," *viz.*, incarceration without any charges was *not* something that Congress envisioned for those *subject to*

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[45]If he is a *Prisoner of War,* then Respondent is entitled to the various protections provided by the 1949, Geneva Conventions and Protocols, *see, e.g.,The 1949 Geneva Convention Relative to the Treatment of Prisoners of War,* http://www.unhchr.ch/html/menu3/b/91.htm.

[46]Creating and applying the label "enemy combatant" to Mr. Padilla does not invoke any jurisdictional basis to militarily detain him.

[47]10 U.S.C. § 809.

[48]"No person" would seem to include Mr. Padilla.

military law. [49] But, if Mr. Padilla is subject to military detention but not charged, he must be released - unless there is a *sub silentio* imposition of martial law. Equally as fundamental is the clause, "any person subject to this chapter." That refers back to § 802(a), which does *not* encompass Mr. Padilla nor could it from a constitutional perspective.

D. The *Irrelevance* of 10 U.S.C. § 956(5).

Petitioner mistakenly seeks to apply 10 U.S.C. § 956(5) as authority for his claim that such explicitly and specifically constitutes Congressional "authorization" for Mr. Padilla's imprisonment.[50] Unfortunately, Petitioner misreads the statute. First, § 956 is part of Chapter 48, of Title 10, U.S. Code. Chapter 48 [§§ 951 *et seq.*] is entitled, "Military Correctional Facilities." Section 951(a) states in relevant (and controlling) part:

> The Secretaries concerned may provide for the establishment of such military correctional facilities as are necessary for the confinement of ***offenders against chapter 47 of this title*** [10 U.S.C. § 801 *et seq.*, the UCMJ].[51]

As noted above, Mr. Padilla is not charged with nor convicted of violating the UCMJ. Thus, his confinement in a military Brig is immediately suspect in light of the obvious Congressional intent.

Looking at 10 U.S.C. § 956 *in toto* (not taking § 956(5) out of context), that section is entitled: ***"Deserters, prisoners, members absent without leave: expenses and rewards."*** Its prefatory line reads, "Funds appropriated to the Department of Defense ***may be used*** for the following purposes:" thus

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[49]*Ergo,* why would Congress then supposedly authorize such for Padilla?

[50]Brief of Petitioner, at 39-40.

[51]This is an express Congressional statement authorizing confinement for "offenders" of the UCMJ - not "enemy combatants."

signifying that Congress did ***not*** have any specified "appropriation" in mind, otherwise they would not have used the discretionary "may be used" terminology.

Turning to subparagraph (5), it shows that there must be "regulations" prescribed,[52] yet those regulations offer no support for Petitioner. However, the correct reading of § 956(5) is this: "Funds appropriated to the Department of Defense *may be used* for . . . (5) . . .expenses ***incident to*** the maintenance, pay and allowances of" those persons denominated.[53] Simply put, the discretionary authorization to use funds *generally* appropriated for military correction facilities' *incidental* prisoner expenses, provides absolutely no support for Petitioner's contention that such a generalized appropriation authorization constitutes an *express* and controlling Congressional grant of authority to detain Mr. Padilla in a military Brig. Such a convoluted interpretation of a general

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[52]*See,* DoD Directive 1325.4, *Confinement of Military Prisoners and Administration of Military Correctional Facilities* (August 17, 2001). This is Petitioner's regulation and there is nothing remotely applicable to Mr. Padilla's "status" therein. However, it does reference DoD Directive 2310.1, *DoD Program for Enemy Prisoner of War (EPOW) and Other Detainees* (August 18, 1994). Again, this is Petitioner's *own* regulation and it begins by referencing the four 1949 Geneva Conventions. It goes on to provide DoD "policy" and paragraph 3.3 states in pertinent part:

> Captured or detained personnel shall be accorded an appropriate status under international law. Persons . . . detained may be transferred ***to*** . . . the care, custody, and control of the U.S. Military Services ***only*** . . . ***as authorized*** by the Geneva Conventions Relative to the Treatment of Prisoners of War and for the Protection of Civilian Persons in Time of War . . . ."

There is ***nothing*** in Petitioner's regulation about imprisoning "enemy combatants," nor do either of the referenced Geneva Conventions recognize that as an "appropriate status under international law."

[53]*Amici* would parenthetically note that persons "detained . . . pursuant to Presidential proclamation," [§ 956(5)], refers to persons incarcerated pursuant to the *Insurrection Act,* 10 U.S.C. §§ 331-35, and § 334 specifically refers to a Presidential proclamation to disburse *prior to* using the military to restore order.

spending authorization, especially in light of the other, significant restrictions Congress has placed upon the use of the military *vis-a-vis* civilians, is unwarranted and unsupported by the plain language of § 956. Congress in its wisdom, knows how and when to exempt the *Posse Comitatus* Act's restrictions and how to otherwise detain civilians. *United States v. Salerno,* 481 U.S. 739 (1987).[54]

CONCLUSIONS

Regardless of what the Commander in Chief may be directing our Armed Forces to do elsewhere in the world, the simple fact remains that martial law does not exist in the United States. Thus, both the Commander in Chief as well as his subordinates are subject to the provisions of the Constitution when it comes to Mr. Padilla's legal rights. The Judiciary has a time honored and constitutionally commanded role to play in adjudicating Respondent's rights. Just as King George III attempted to use his military to subvert civilian rule, so is the Petitioner overtly saying that the military judgment of the Commander in Chief - not the Constitution - suffices "to render the Military independent of and superior to the Civil Power." Our *Declaration of Independence* showed that to be an unacceptable concept then, and it must remain so today.

Regardless of what the Government suspects Mr. Padilla of doing or thinking of doing, the lessons of history command that we object to his illegal and *continued* military confinement herein, especially after two years without any Due Process.

Vast numbers of our citizenry have mobilized militarily to engage in combat in locations far from home. Lest we forget, each person in uniform has taken an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic. . . ." 10 U.S.C. § 502. Those in uniform

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[54]*Salerno* upheld the comprehensive provisions of the *Bail Reform Act,* 18 U.S.C. § 3141 *et seq.*, which authorized *pretrial* detention without bail after providing significant procedural due process protections. Mr. Padilla has not even been afforded those rights.

now and in times past who have paid the ultimate sacrifice, did so to "defend the Constitution of the United States." Doing that is the ultimate fight for "national security" and *Amici Curiae* respectfully urge this Court to recognize just what our veterans have fought, sacrificed and died for - the collective rights of liberty and justice for all.

Habeas Corpus respectfully should lie for Mr. Padilla.

Respectfully Submitted,

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